Supreme Court, U.S.
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No. 04-_____

IN THE

Supreme Court of the United States

HONEYWELL INTERNATIONAL INC.,

Petitioner,

v.

INTERFAITH COMMUNITY ORGANIZATION, INC., *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether citizens have Article III standing to sue for cleanup of pollution on a site without proof that they suffer cognizable harm caused by site pollution in any activity they do or would undertake.

2. Whether, in a citizen suit under Section 7002 (a)(1)(B) of the Resource Conservation and Recovery Act, the determination of "imminent and substantial endangerment" is a mixed question of law and fact requiring deference to expert agency judgment and probing appellate scrutiny of a district court's rejection of expert agency judgment.

3. Whether a district court under Section 7002(a)(1)(B) must limit relief to what is "necessary" to abate any specifically identified imminent and substantial endangerments, or whether it may use the provision to displace federal and state agencies, and the balanced policies that govern them, in fashioning long-term remedies for hazardous-waste sites.

PARTIES TO THE PROCEEDING

Honeywell International Inc., formerly known as AlliedSignal, Inc., was the appellant in the Third Circuit. Interfaith Community Organization, Lawrence Baker, Martha Webb Herring, Margaret Webb, Rev. Winston Clarke, and Margarita Navas were appellees. W.R. Grace & Company, ECARG, Inc., and W.R. Grace, Ltd. were defendants in the district court and were appellees when the appeal commenced, but all claims to which they were parties were settled before the court of appeals issued its decision. Roned Realty of Union City, Inc. and Roned Realty of Jersey City, Inc. were named as defendants but resolved all claims before the appeal commenced.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Honeywell International Inc., does not have any parent corporations, and no publicly traded company owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Honeywell International Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit (Pet. App. A1-A38) is reported at 399 F.3d 248. The relevant opinions of the district court (Pet. App. A39-A218) are reported at 263 F. Supp. 2d 796 and 188 F.Supp. 2d 486.

JURISDICTION

The judgment of the Third Circuit was entered on February 18, 2005. Pet. App. A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7002 of the Resource Conservation and Recovery Act (RCRA), codified at 42 U.S.C. § 6972, is reproduced at Pet. App. A219-25. Sections 105 and 121 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9605 and 9621, are reproduced at Pet. App. A226-48. The provision of the Environmental Protection Agency's National Contingency Plan, 40 C.F.R. 300.430, governing remedy selection is reproduced at Pet. App. A250-74.

STATEMENT

As respondents ("ICO") recently acknowledged with considerable understatement, the Third Circuit decision "will almost certainly be a leading case in the development of RCRA law." ICO Reply Brief in Support of Application for Fees, at 4 (3d Cir., May 5, 2005). The Third Circuit has so expanded both Article III standing and the scope of the citizen-suit provision of RCRA, Section 7002(a)(1)(B), that hundreds or thousands of sites across the Nation needing

cleanup can now readily be brought under broad district court control at the behest of almost any nearby resident. With its broad-brush treatment of Section 7002 – which authorizes only "necessary" action to address "imminent and substantial endangerment[s]" – the Third Circuit has authorized displacing the expert federal and state agencies established for the handling of these sites, and the balanced policies and processes that govern their decisions. The Third Circuit's view of the scope of Section 7002, together with its weakening of Article III standing requirements, produces a massive shift in authority from agencies to the federal courts. This Court should review the decision to restore the more limited role of Section 7002, required by its language and by the duty to read it in accord with the policies of the Superfund program created under CERCLA, which the Third Circuit did not even mention.

A. Statutory Framework

1. CERCLA. Congress enacted CERCLA in 1980 because "existing law [was] clearly inadequate to deal with [the] massive problem" of cleaning up already contaminated sites, such as Love Canal. H.R. Rep. 96-1016, at 17-18 (1980); *see Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Congress gave the President broad powers (delegated to the Environmental Protection Agency) to undertake cleanups. CERCLA § 104, 42 U.S.C. § 9604. EPA also can order responsible parties to undertake cleanups. CERCLA § 106, 42 U.S.C. § 9606. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 580 (2004). Congress gave only EPA, not private parties, the right to compel cleanup by responsible parties. CERCLA § 106(a).

Congress recognized that in addressing contaminated sites, EPA needed the tools to address the most immediate risks on an expedited basis but also should carry out its responsibility to determine the best long-term cleanup strategy more methodically and pursuant to balanced

national policies. CERCLA distinguishes those authorities by authorizing: "removal" actions to address immediate needs and, after necessary studies and analysis, "remedial" actions to achieve a long term cleanup. CERCLA § 104(a); *see* CERCLA § 101(23), (24) (defining terms), 42 U.S.C. § 9601(23), (24); S. Rep. No. 96-848 at 54 (1980) ("'Remedy' involves the more permanent, costly measures which may be necessary after the need for emergency action has terminated."). CERCLA also provides for EPA's creation of the National Priorities List ("NPL")—the list of top-priority sites based on the "relative degree of risk to human health and the environment." CERCLA § 105(c), 42 U.S.C. § 9605(c) (Pet. App. A229-30).

Congress directed EPA to revise the National Contingency Plan for the removal of oil and hazardous substances ("NCP"), 40 C.F.R. pt. 300, to prescribe procedures and standards for site investigation and remedy selection, specifically including cost-effectiveness as a statutory requirement. CERCLA § 105. Congress declared that after such revisions were made (as they were in 1982) "the response to and actions to minimize damage from hazardous substance releases shall, to the greatest extent possible, be in accordance with the provisions of the plan." CERCLA § 105(a) (Pet. App. A226-29).

The NCP sets forth detailed and rigorous requirements for selection of remedial actions – this provision alone is about 6,500 words. 40 C.F.R. 300.430 (Pet. App. A249-73) It provides as essential elements of the remedial selection process the performance of in-depth scientific studies known as remedial investigations ("RI") and feasibility studies ("FS"). "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes multiple steps: project scoping, data

collection, risk assessment, treatability studies, and analysis of alternatives." 40 C.F.R. 300.430(a)(2) (Pet. App. A251).

The NCP requires evaluation of nine factors in the remedy selection process. One is "implementability," which, if excavation and off-site disposal are being considered, looks to off-site disposal capabilities: it requires analysis of "availability of adequate off-site treatment, storage capacity, and disposal capacity and services." 40 C.F.R. 300.430(e)(9)(iii)(F)(3) (Pet. App. A264). Another criterion is "that the remedy is cost-effective," meaning that "its costs are proportional to its overall effectiveness." 40 C.F.R. 300.430(e)(9)(iii)(G) (Pet. App. A264-65). This provision reflects the *statutory* requirement "that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials." CERCLA § 105; *see* CERCLA § 121(a), (b)(1), 42 U.S.C. § 9621(a), (b)(1) (Pet. App. A236-37) (EPA remedial actions must be "cost-effective").[1] So important are the NCP criteria that, for large-scale remedial actions, EPA utilizes a National Remedy Review Board "to help control remedy costs and to promote both consistent and cost effective decisions at Superfund sites."[2]

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[1] EPA, *The Role of Cost in the Superfund Remedy Selection Process* 5 (1996) ("CERCLA and the NCP require that every remedy selected must be cost-effective.") (emphasis in original) (CAJA17393); EPA, *A Guide to Selecting Superfund Remedial Actions* 5 (1990) (CAJA17415). (We cite the appendix in the Third Circuit as "CAJA__.")

[2] Memorandum from Elliot P. Laws, *Formation of National Superfund Review Board*, (Nov. 28, 1995), available at http://www.epa.gov/superfund/programs/nrrb/pdfs/11-28-95.pdf. Initially, EPA required Board review of remedies expected to cost over $30 million, but the threshold was recently reduced to $25 million, because the $30 million threshold left well over 90% of remedies unreviewed. EPA, *National Remedy Review Board Criteria Revision* (March 21, 2005), available at http://www.epa.gov/superfund/programs/nrrb/pdfs/03-21-05.pdf. Thus, fewer than 10% of all remedies –

The procedural and substantive prescriptions under CERCLA are mirrored in New Jersey. *See* N.J.A.C. 7:26E-1; CAJA03062. *See* Administrative Consent Order (1993) (CAJA07633; CAJA07646-41).

2. RCRA Section 7002. "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig*, 516 U.S. at 483. As enacted in 1976, RCRA authorized only EPA, not citizens, to sue to abate imminent and substantial endangerments. RCRA § 7003, 42 U.S.C. § 6973. In 1984, Congress expanded Section 7002 to allow adversely affected citizens to sue to redress imminent and substantial endangerments in addition to statutory violations. Congress authorized federal district courts to take action "necessary" to redress the "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." With the revised NCP already in place, Congress neither wrote nor required new or different guidelines to govern § 7002 suits. In *Meghrig*, this Court made clear that CERCLA was intended to be the primary federal tool for addressing contaminated sites, explaining that "RCRA is not principally designed to effectuate the cleanup of toxic waste sites." *Meghrig*, 516 U.S. at 483.

Congress intended § 7002, even as expanded, to "complement, and not interfere with, Federal regulatory and enforcement programs." S.Rep. 98-284 at 55 (1983); *accord* H.R. Rep. 98-198 at 53 (1983); *Greenpeace v. Waste Technologies Industries*, 9 F.3d 1174, 1179 (6th Cir. 1993) (§ 7002 citizen suits are to "augment government environmental enforcement"). Indeed, when it enacted the citizen-suit provision, Congress included Section 7002(b)(2)(B) & (C), which bar § 7002(a)(1)(B) suits in their

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remedies for those high risk sites on the NPL – cost as much as $30 million.

entirety where federal or state agencies have initiated proceedings under certain CERCLA provisions. The 1984 Senate Report, moreover, states that, even where the suit is not barred, "injunctive relief is an equitable remedy and, although there is no requirement to exhaust other remedies, courts should be cognizant of and consider such alternatives when awarding equitable relief." S. Rep. No. 98-284, at 57.

B. This Case

This case involves a 34-acre parcel in Jersey City, New Jersey, at which a corporate predecessor of petitioner Honeywell, ending more than 50 years ago, lawfully disposed of the chromium ore processing residue ("COPR") from operations at an adjacent chromium processing plant. The site, though reviewed by EPA, has never been listed on the National Priorities List; nor has New Jersey's Department of Environmental Protection ("NJDEP") proposed it for listing. NJDEP has, however, been actively addressing the site, along with some 200 other COPR sites in the area. Before this RCRA citizen suit began in 1995, Honeywell had implemented interim measures in coordination with NJDEP to address immediate risks at the site, and worked with NJDEP through the complex step-by-step process of formulating chromium standards generally (NJDEP completed them in 1998), setting priorities among the many area chromium sites, analyzing conditions at this and other sites, and studying possible permanent remedies.

The Third Circuit in this case approved the interruption and displacement of that process. It affirmed the district court's decision to take control of the permanent cleanup of the site at the behest of neighboring citizens under RCRA Section 7002, and the order to excavate massive amounts of soil—1,500,000 tons of it—and remove it to somewhere else, at a cost of more than $400 million dollars, and under the multi-year control of court-appointed Special Master Robert Torricelli (former U.S. Senator) and his extensive staff. It thus affirmed the district court's rejection

of a containment/capping remedy even though such a remedy is in widespread, effective use around the country, is EPA's presumptive remedy for large volume sites like this one, and would be effective here.

1. Facts. The site at issue ("Property") was created between 1895 and 1954 when Honeywell-predecessor Mutual Chemical, engaged in making chromium products with many civilian and military uses, disposed of COPR on tidal flats along the Hackensack River pursuant to a series of riparian grants from Jersey City. Pet. App. A3; CAJA4105. Disposal of COPR as fill was common at the time. NJDEP has identified over 200 COPR sites in the area. CAJA11757; NJDEP, *Hudson County Chromate Chemical Production Waste Sites: Background* (1997)(CAJA17647). The Hackensack River adjacent to the Property is not a scenic wilderness area: it is lined with many industrial facilities (CAJA17323; CAJA16749-68) and has heavy concentrations of mercury and other pollutants. CAJA7567; CAJA11075. The Property is largely vacant (CAJA16850) and is surrounded by industrial/commercial sites (CAJA10741; CAJA10744-45).

The Property contains roughly 1,000,000 cubic yards (1,500,000 tons) of COPR-contaminated fill, extending down 15-20 feet. Pet. App. A3. Various forms of chromium are naturally occurring (CAJA11297; CAJA11403) and beneficial if ingested (CAJA3524). The hexavalent chromium in COPR, however, can pose certain risks – depending on exposure and dose.

EPA inspected, and took samples from, the Property in 1980 and 1981. CAJA4819. EPA did not view the Property as a high-priority site. It took no response action itself; it required no private cleanup; and it did not place the Property on the NPL of hazardous sites – over 1500 sites (130 in New Jersey as of 1999). 40 CFR Part 300, Appendix B; NJDEP, *Site Remediation Program Annual Report* at 23 (1999) (CAJA17636). In 1997, after Honeywell had taken

various exposure-control measures, EPA again inspected the Property and determined: "***[t]here are no conditions on site that would warrant immediate or emergency action***." CAJA10741; CAJA10752.[3]

NJDEP began addressing COPR at the Property and some 200 other sites in the early 1980s. In January 1987, NJDEP announced that its immediate priority was interim remedial measures ("IRMs"). CAJA2843-44. AlliedSignal (Honeywell's predecessor) developed an IRM plan (CAJA6019) to cover the Property to prevent releases to the air and contact by humans and wildlife. After various comments, NJDEP approved the IRMs in July 1987 (CAJA6069; CAJA6083). AlliedSignal proceeded to implement this plan (CAJA6087; CAJA6089) and by 1990 had substantially completed the IRMs: it removed debris, demolished structures, regraded to direct surface water to swales (drainage ditches), repaired paving, and installed a PVC liner (CAJA6453; CAJA6531). NJDEP selected a bulkhead reconstruction remedy in July 1990 (CAJA7089; CAJA7111), and AlliedSignal thereupon completed the IRM work (CAJA7359; CAJA7447).

After 1990, AlliedSignal maintained the IRMs and upgraded them (notably, repairing and covering the liner with a geotextile membrane and gravel after wind caused damage in 1992). At the time of trial, a fence surrounded the Property; the IRMs (asphalt, concrete, and three-layer caps) prevented exposure to the soil (CAJA1474); and hexavalent chromium in swale surface water was below the government-set threshold for problems from skin contact (allergic contact dermatitis). CAJA16852. ***After installation***

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[3] About groundwater, EPA said: "there is no true aquifer of concern." (CAJA10741; CAJA10756). EPA noted no significant concerns about surface-water discharges to the Hackensack River or exposure to soils CAJA10741. About airborne releases, it concluded: "There is currently little potential for a release of contaminants attributable to the site to air...." CAJA10741; CAJA10765.

of the IRMs, NJDEP did not believe the Property presented a risk to human health. CAJA3053, CAJA3115-16.

NJDEP viewed developing the permanent remedy as less urgent and more complex. In June 1993, AlliedSignal signed an Administrative Consent Order providing for the normal step-by-step approach to identifying appropriate action at 21 sites, including the Property (CAJA7633; CAJA7679; CAJA7941), and committing up to $60 million, with NJDEP reserving its rights to compel cleanup at higher costs. 1993 Order ¶¶36, 53, 62-67 (CAJA7640; CAJA7644; CAJA7647-49).[4] The process, as with CERCLA inquiries, required, *first*, an Remedial Investigation to identify the precise conditions needing remedy, *second*, a Feasibility Study to analyze remedial alternatives and select a remedy, and *third*, Remedial Action. CAJA7633-41.

In the ordinary course, each step involves study, drafting, comment, and revision, and that process occurred here. NJDEP recognized that the process was slowed by its own failure to publish chromium standards until September 1998. CAJA11467; CAJA11487 (NJDEP: "full compliance ... has not been achieved, as we have been awaiting the development of the chromium numbers"). In 1999, NJDEP observed that "[p]reviously and rightfully so, the chromium responsible parties insisted that the development of such criteria were necessary to complete the remedial investigation." CAJA11721.

Even before the adoption of chromium standards, AlliedSignal submitted, and NJDEP ultimately approved, workplans for soil and groundwater sampling. *E.g.*, CAJA10035; CAJA10001. In December 1999, on schedule,

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[4] In July 1993, AlliedSignal proposed to give the Property top priority. CAJA7691; CAJA2863-68. Jersey City disagreed (CAJA7687), and NJDEP gave the Property lowest priority, because the Property was abandoned, no one lived there, and IRMs had been installed, so it presented no risk to human health. CAJA3053, CAJA3115-16.

AlliedSignal submitted draft Remedial Investigation reports. CAJA12261; CAJA13485; CAJA11921. The September 2002 draft report (CAJA15873-16117) comprehensively reviews the environmental condition of the Property. Although Honeywell and other chromium manufacturers have studied various treatment alternatives, a Feasibility Study systematically comparing options was not completed at the time of trial.

2. District Court Proceedings. In 1995, respondents (the ICO entity and five individuals who live in the area) sued under the "imminent and substantial endangerment" citizen-suit provision of RCRA. They sought no preliminary injunction. When the district court invited NJDEP to participate, NJDEP declined, explaining that the Property "is one of a number of separate sites" being addressed and "Allied Signal is in compliance with th[e] Administrative Consent Order. The remedial investigation required by that Consent Order has not been completed. The NJDEP expects that the Administrative Consent Order will result in remediation of the [property]." CAJA345.

In 2002, the district court found on summary judgment that respondents had standing. Pet. App. A188.

After a 15-day bench trial in January/February 2003, the district court found for ICO on its RCRA claims (Pet. App. A39-174) and entered injunctive relief (Pet. App. A175-87). Though it nowhere clearly enumerated the specific endangerments found, the court's opinion discussed three categories: (1) hypothetical risks if certain future uses of the property took place (such as future use of deep groundwater as drinking water); (2) current risks to trespassers on the Property; (3) risk of exposure of wildlife to surface water on the Property, exposure of fish and other organisms in the Hackensack River to surface water and groundwater discharges from the Property, and exposure of river-bottom organisms to contaminated sediments in the Hackensack River near the Property. The only short-term

risk to humans identified by the district court was potential exposure of trespassers (which respondents did not claim to be) to surface water and soil on the Property.

Because the NJDEP process had not reached the Feasibility Study stage when trial began, the experts at trial did not have, as foundation, the normal step-by-step studies used for remedy assessment. But the key remedial expert on ICO's side (Brown) unmistakably testified that containment remedies – which leave the soil in place but add safeguards against exposure – would in fact be environmentally sufficient *while maintained.* CAJA2593-94; *see* CAJA1124 (Ross) (same). NJDEP's project manager added that containment remedies had worked at other chromium sites and were among the remedies "evaluated by the Department as sufficient to deal with the necessary environmental hazards at the site." CAJA3273, 3276-77. In fact, containment remedies (for municipal landfills and many other large volume sites) are commonly used around the country; they are the presumptive EPA-approved remedy.

The district court, however, insisted on a "permanent" solution (Pet. App. A90) and ruled that a containment remedy was not permanent enough: a containment remedy "would require substantial maintenance for years, and ... future generations would be required to abide by whatever restrictions were placed on the property. ... Human nature being what it is, I am not satisfied that future generations will necessarily abide by today's restrictions." *Id.* at A93. The court thus ordered Honeywell to excavate, remove, treat, and properly dispose of all soil containing over 240 parts per million hexavalent chromium (roughly 1,500,000 tons of soil), then replace it with clean fill. It also ordered hydraulic controls to prevent recontamination; unspecified remediation of sediments in the Hackensack River adjacent to the Property; and investigation (and, if necessary, remediation) of deep groundwater. One

expert at trial estimated that the work would cost $400 million. Pet. App. A91.

In entering an injunction of this magnitude, the district court did not follow the systematic NCP remedy selection process and criteria. It gave barely a nod to cost effectiveness, and did not even mention such important factors as the amount of the Nation's hazardous waste landfill capacity that this one excavation remedy (for a low-priority site) would consume and possible adverse environmental effects from the remedy itself (*e.g.*, massive daily trucking for years).

Recognizing "the complexity of this case and the technical nature of the remedial relief" the court appointed former Senator Robert Torricelli as Special Master. Pet. App. A177-79. In addition to his own staff, Senator Torricelli has hired a law firm and an environmental consulting firm. Over 40 people (including eight attorneys, a paralegal, and 31 employees of the consulting firm) had billed time through April 30, 2004. CAJA17765. Implementation is expected to take six years. CAJA17865.

3. Court of Appeals Decision. The Third Circuit affirmed. Pet. App. A1. The court first held that ICO had standing, resting the organizational standing entirely on the standing of the individual plaintiffs. *Id.* at A8-13. As to the individuals, the court did not reject as a factual matter Honeywell's showing that respondents had no evidence that chromium originating from the Property in fact caused any harmful exposure to respondents in any of the activities (walking or driving near the Property or the adjacent polluted urban river) that they said they engage in or would engage in but for the on-site chromium. The court upheld standing based on respondents' expressed health "concerns" from living or driving near the Property, or walking or biking by the River, irrespective of whether those concerns had any factual basis to them. *Id.* at A9-12.

The court next upheld the district court's determination of "imminent and substantial endangerment." The court (by a 2-1 vote) reviewed the determination merely for "clear error," treating it as a factual matter (*id.* at A6). While the court of appeals disregarded the district court's reliance on hypothetical future risks, it affirmed the district court's overall determination of present risks. It did not assign any weight, even on the question of what was a "substantial" risk, to the applicable EPA and NJDEP determinations – both viewed the site as not presenting a serious danger after the IRMs were in place. Indeed, the court specifically rejected as too demanding the district court's partial reliance on agency-set standards for contaminant levels. Applying its lax standard of review, the Third Circuit undertook no careful review to insist that *each* alleged endangerment presented simultaneously a harmful contamination level *and* a realistic likelihood of exposure at that level (which the evidence does *not* prove). *Id.* at A19-24.

Finally, the court upheld the district court's excavation remedy, despite the statutory "necessity" standard. In response to the evidence from the key expert supporting respondents that lesser measures would stop any endangerments, the court focused approvingly on the district court's search for a permanent remedy:

> [T]he District Court also found, specific to remedy, that a **permanent** solution (as opposed to an interim solution) was necessary within the meaning of the statute to eliminate the established endangerments; that NJDEP had already independently come to the same conclusion; that injunctive relief, as opposed to some other form of relief, was necessary to obtain a remedy that was **permanent;** that Honeywell presented no credible evidence at trial that either a containment "cap" or shallow groundwater treatment, or both, would be an effective **permanent** remedy; and that excavation and

> removal of the contamination from the Site was necessary within the meaning of the statute to ensure a **permanent** remedy.

Pet App. A24-25 (emphasis added). In response to Honeywell's argument that the scope of "necessary" relief under the RCRA citizen-suit provision must be limited to reflect the CERCLA-established processes, criteria, and commitment of permanent cleanup to expert agencies, the Third Circuit was effectively silent. The Third Circuit opinion does not even mention CERCLA, much less seek to construe RCRA to respect CERCLA's policies.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision presents important legal questions about the ability of citizens, including those who amount to mere concerned bystanders, to secure federal-court control over sites generally needing cleanup, displacing the agency-controlled processes and the legislatively and administratively set policies that otherwise govern this nationwide task. The decision throws open the doors of the federal courts to such agency-bypassing suits. It does so both by weakening the requirements for environmental standing almost to the point of non-existence and by loosening the standards of RCRA Section 7002 to make it a general authorization for citizen-provoked environmental cleanup. That the decision represents a dramatic change in existing assignments of responsibility for a complex national problem cannot reasonably be questioned, as ICO has in effect acknowledged. Page 1, *supra*.

The first step in the Third Circuit's decision was to find standing (a jurisdictional issue) without satisfaction of the bedrock requirement of harm caused to plaintiffs' cognizable interests by the challenged conduct. The court read *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000), as if it dispensed with any requirement for standing beyond allegations of concern by those who

pass by a polluted site, without proof of any harm from the identified pollution to the individual plaintiffs in their activities related to the site. That view all but eliminates the Article III requirements for environmental standing, and allows suits by plaintiffs who are effectively mere bystanders with fears. This Court should correct that reading of *Laidlaw*.

The Third Circuit further expanded federal court cleanup authority, by deciding that whether an endangerment existed was solely a factual issue, to be reviewed with maximum deference to the district court and without required deference to expert agencies. Given the absence of any statutory definition of "imminent" or "substantial," the terms necessarily import policy judgments that are not purely factual, and when agencies have actually addressed the matter, their judgments must be given significant deference in the judicial determination under Section 7002. Mere "clear error" review fails to assure the presence of the demanding basis for citizen-suit involvement. The Third Circuit's contrary approach throws every site not being addressed under CERCLA into the isolated hands of individual district courts at the behest of citizens, in disregard of agency determinations like those here – by both EPA and NJDEP – that, with containment measures in place, this site required no judicial intervention.

The Third Circuit then further broadened the reach of judicial authority at the remedy stage of the litigation under Section 7002, which limits relief to just that "necessary" to address the endangerment found. The Third Circuit turned this standard into a license for the district court to seize the opportunity to clean up the site once and for all. But the statutory language imports the normal requirement of narrow tailoring, which supports no more than the relief that will be abate the imminent and substantial endangerment–here, by the testimony of the key expert for ICO's side, no more than a containment remedy. As important, the fundamental

obligation of the courts is to read RCRA Section 7002 in the context of the surrounding statutes, most notably CERCLA. Much as in RCRA itself, Congress in CERCLA made plain its policies about who should control permanent cleanups (agencies), through what processes (the step-by-step processes under way at NJDEP but short-circuited by the ruling here), and under what standards (balancing policies reflected in CERCLA § 105 and the NCP). The Third Circuit allowed override of those policies by its loosening of the remedial standard under the RCRA citizen-suit provision – available, now, in the face of agency decisions that a site does not present a need for urgent intervention and at the behest of almost any concerned citizen.

This Court should review and reverse the Third Circuit decision, whose several rulings together dramatically shift power over environmental problems from agencies to courts by expanding the narrow role properly reserved for RCRA's citizen-suit provision, as recognized in other courts.

I. The Decision Eliminates Bedrock Article III Standing Requirements for Environmental Suits

Article III jurisdiction depends on the fundamental requirements of standing – concrete, individualized, cognizable injury that is fairly traceable to the challenged conduct (not others' conduct) and likely to be redressed by success. *McConnell v. FEC*, 540 U.S. 93, 225-26 (2003). In this case, the Third Circuit treated this Court's decision in *Laidlaw* as effectively eliminating in environmental cases any objective requirement of concrete, individualized, cognizable injury traceable to the challenged conduct. This Court should correct that over-expansive reading of *Laidlaw* and thus restore standing doctrine's essential role, in environmental as much as other cases, in preventing federal court adjudication based on self-generated subjective attitudes that lack objective grounding and could be asserted by virtually any member of the public.

Laidlaw involved individuals whose recreational activity in or on a public wilderness waterway–they swam and waded in the river–and whose aesthetic and economic interests in this public resources were harmed by the mercury pollution from the challenged discharges. The Court took care to note that plaintiffs had "*reasonable* concerns about the effects of those discharges." 528 U.S. at 183-84 (emphasis added).

In the present case, the Third Circuit did not require, and could not have found, such an objective causal connection of the pollutants to a cognizable interest of the plaintiffs in the activities they engage in. The Third Circuit did not rely on any economic harm to property values, because plaintiffs proved none. It did not rely on any aesthetic interest of plaintiffs in the appearance of the site from beyond its borders: the site, after all, is *private* property, and any such interest is subjective and not individualized. Instead, the Third Circuit relied on two things: plaintiffs' "concerns" about their health from merely *walking and biking near* the Hackensack River or from driving, or going to gas pumps, *near* the Site; and plaintiffs' statements that they would enjoy walking or biking *near* the River "[i]f the river were cleaner." Pet. App. A9-10.

These two bases are not enough. The Third Circuit did not require, and could not have found, any actual danger whatever from going near the River *or* Property in the ways plaintiffs do (or would). As to "enjoyment" of the River, the court-described assertion is on its face inadequate: by its terms it addresses pollution generally, not chromium from the Property. And the Third Circuit did not require, and could not have found, that chromium from the Property causes the River to *look* or *smell* worse to walkers and

bikers. There is simply no objective causal connection of the chromium to any health or aesthetic interest.[5]

In short, the Third Circuit upheld standing without requiring that the plaintiffs be any more than bystanders with ungrounded fears. There is nothing objectively founded or individualized about such a basis for standing, and *Laidlaw* did not approve standing in such circumstances. If no more is required for standing, it is hard to see what is left of Article III standing in environmental cases.

Although this constitutionally erroneous expansion of federal court power is sufficient reason for review, the Third Circuit decision also conflicts with at least *Central and South West Services, Inc. v. EPA,* 220 F.3d 683 (5th Cir. 2000). The Fifth Circuit there rejected standing of the Sierra Club, explaining specifically that a member it relied on (to challenge an EPA rule) "present[ed] no facts to support th[e expressed] concern" that PCB waste disposed of in his town's landfill "may leach from the landfill and somehow enter the town's water supply." *Id.* at 700. The court held: "This subjective concern ... cannot serve as the basis for Sierra Club's standing." *Id.*

II. The Decision Improperly Treats "Imminent and Substantial Endangerment" Simply As a Factual Issue, Without Deference to Agency Judgments

The Third Circuit's 2-1 treatment of "imminent and substantial endangerment" as a purely factual issue meriting only "clear error" review misunderstands the nature of the

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[5] The court of appeals' reference to "fishing" (Pet. App. A9-10) was a statement about would-be activities of *someone other than a plaintiff* (or, indeed, any ICO member). Not surprisingly, this statement was *not* relied on by the district court in its standing findings. Pet. App. A204-11. Indeed, there is no evidence that curing any chromium release from the site here could reasonably lead anyone to fish more (the evidence of fish harm from chromium in the River is all but nonexistent and the Hackensack River is so polluted by mercury and other contaminants that fishing would not take place anyway).

issue and strips away the necessary guarantee of a sound foundation for the kind of massive judicial intervention that occurred here. The majority upheld such intervention despite, and without giving significant weight to, the plain view of two expert agencies – EPA and NJDEP – that the environmental problems present after interim measures were in place at the Property did not warrant immediate court action. Moreover, rejecting the relevance of expert agency determinations of what risks are substantial, the court failed to scrutinize the district court's determination so as to ensure focused and well-supported findings of the conjunction of contaminants exceeding applicable levels of serious risk *and* imminent exposure at those levels. Deferring only to the district court and not expert agencies improperly leaves the critical endangerment determination in the essentially isolated hands of individual district courts.

As Judge Ambro observed (urging a "mixed question of law and fact" standard of review), there are at least two questions here: what are the risks? (factual); are the risks so immediate and so serious as to be "imminent and substantial"? (legal). Pet. App. A33. Both components of the latter question involve policy judgments that are *legal* determinations. This Court has construed and applied "imminent" in various settings. *Meghrig*, 516 U.S. at 485 ("The meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it threatens to occur immediately."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure … that the injury is '*certainly impending*' ...."). Of particular moment in this case, whether a risk is "substantial," though of course involving facts, plainly requires a policy judgment. Practically all sites, like all things, present some level of risk. The required assessment is determining which are sufficiently great to demand immediate intervention. On such a matter, expert

agencies, when they have made an applicable judgment, are owed judicial deference; agencies' larger perspective, expertise, and responsibilities ensure a more rational systemic approach to environmental problems.

Such deference would make a large difference here. The courts below appear to describe a completely different site from the one evaluated by EPA and NJDEP. EPA concluded in 1997 that "no conditions on site ... warrant immediate or emergency action" (CAJA10752), and NJDEP, after the IRMs had been installed, assigned *last* priority to this site and found that the site "did not pose a potential risk to human health" (CAJA3053). Yet the difference between the courts' and agencies' views is not attributable to any apparent factual disagreement about sampling results or other underlying facts, but to different policy judgments regarding environmental risk, a critical *legal* issue. Those policy judgments are reflected in the NCP factors and the basic agency goal to "manage risks to acceptable levels."[6] They are reflected, too, in the agency insistence on carefully identifying specific pathways of exposure to contaminants and evaluating the likelihood of harm in each pathway given the mode and duration of exposure to the specific level of contamination. *See* EPA, *Exposure Factors Handbook* (Aug. 1997) (CAJA10243).

Despite the length of its opinion, the district court did not come close to undertaking the careful exposure-by-exposure analysis agencies would follow. It instead cooked up a stew of disparate facts that, stirred together, appeared frightening. Tossed in the pot together were facts about contamination without regard to exposure, facts about past exposures without regard to whether they had been addressed through IRMs, facts about exceedances of remediation standards without regard to whether the standard

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[6] *Superfund Risk Assessment*, available at http://www.epa.gov/oswer/riskassessment/risk_superfund.htm.

was even relevant to the specific exposure, and facts about contaminant releases from the site without regard to whether the resulting level or extent of contamination was seriously harmful. Noticeably absent from the discussion were the present views of the expert environmental agencies charged with investigating and cleaning up environmental contamination – and an appreciation of the appropriateness of the NJDEP's deliberate step-by-step process for identifying risks and addressing the inherently complex problem of 200 chromium sites.[7]

On review, the Third Circuit gave no deference to the site-specific agency determinations, or to the normal agency method for addressing problems like those presented here. The Third Circuit even repudiated the need to rely on agency-set standards for the identification of perilous contamination levels. Given its loose view of the required inquiry, the Third Circuit did not scrutinize the evidence for each specific exposure pathway, and it therefore ended up letting pass the district court's many mischaracterizations of the level of risk presented by the site. Pet. App. A 19-24. [8]

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[7] Some context for the complexity of chromium issues is provided by the 200-page EPA *Guidance for Conducting Remedial Investigations and Feasibility Studies* (CAJA6137-322) and by the 167-page proposed federal rules for workplace exposure to hexavalent chromium, released in 2004. 69 Fed. Reg. 59306-473. The latter analysis is almost entirely about airborne risks, which present no serious issue for the Property.

[8] For example, the Third Circuit recited the district court's findings of rips and holes in the plastic liner and cracks in the asphalt cap (Pet. App.A20) without noting the undisputed evidence that the rips from wind damage were repaired in 1992-93, that the repaired plastic liner was then covered with a geotextile membrane and gravel layer to prevent a recurrence, that the subsequent small perforations in the liner were beneath the membrane and gravel, and that the asphalt cracks were patched. Similarly, the Third Circuit recited the district court's findings that hexavalent chromium in the drainage ditches on the site exceeded a New Jersey standard of 50 parts per billion (*id.* at A19), and suggested that trespassers could be harmed by exposure to this water (*id.* at A21),

Had the Third Circuit conducted the required review, and given due deference to the applicable EPA and NJDEP determinations, it would have had to reject the endangerment determination in its entirety or, at a minimum, so narrow any possible determination that what remained could not support the massive remedy adopted. It would have seen that there is no present exposure pathway for human inhalation or ingestion – necessary for severe harm (like lung cancer) – and at most a small chance of trespassers suffering the less severe harm (skin injuries) caused by direct contact. There is at most a very small chance that aquatic organisms in the Hackensack River are being harmed by releases of hexavalent chromium: the river water has never exceeded the relevant agency-set standard. Only sediment samples raised an issue under regulatory standards for triggering further analysis, as Honeywell agreed (Pet. App. A20), but what was required were (a) a separate determination whether any effects on sediment-dwelling organisms from chromium was "substantial" given the River's other pollutants, the limited area of sediments potentially affected by the site, and the absence of reliable studies at the time of trial and (b) what if any remedy was warranted by the sediment problem alone. That analysis was not undertaken.

Although the Third Circuit cited decisions in cases brought by the United States under RCRA Section 7003 (Pet. App. A14-15), those decisions cannot support its approach to review of endangerment determinations. Critically, such cases, unlike citizen suits, are instituted only after EPA, an expert agency, has made a determination that a site does present a serious threat demanding immediate intervention. Indeed, "imminent and substantial endangerment" provisions in other environmental statutes, are limited to agency-

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but failed to note that the 50 ppb standard was for chronic exposure of *aquatic* organisms; the relevant standard for human trespassers, in contrast, is 500 times higher – 25 parts per *million* (*id.* at A108), which was not exceeded.

brought suits. *E.g.*, 33 U.S.C. § 1364; 42 U.S.C. §§ 300i, 7603, 9606(a). That pattern reinforces the contextual need to defer under RCRA Section 7002.

The Third Circuit's broad authorization of free-standing district court determinations of "imminent and substantial endangerment" markedly contrasts with other circuits' insistence on keeping the provision limited[9] and not overriding agency determinations.[10] The Third Circuit approach invites citizens to sue under RCRA Section 7002 for almost any property with contamination above background levels, whether or not an expert agency, acting pursuant to statutory mandate, believes the site presents a serious enough threat to warrant immediate intervention. That approach fundamentally changes the proper backstop role of RCRA Section 7002.

III. The Decision Expands Citizen-Suit Remedies Beyond What Is "Necessary" to Redress Imminent Risks, Disregarding Congressional Policy on Permanent Cleanups and Federal Court Limits

Section 7002(a)(1)(B) authorizes the district court to issue only orders that are "necessary" to abate any imminent and substantial endangerment. That standard reinforces the

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[9] *Avondale Fed'l Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 695 (7th Cir. 1999) (no endangerment when exposure would occur only if excavation undertaken in the future); *Birch Corp. v. Nevada Inv. Holding, Inc.*, No. 97-55282, 1998 WL 442982, at **2 (9th Cir. June 29, 1998) (no evidence of imminent endangerment when owner had no plans for soil excavation or use of groundwater.); *Price v. U.S. Navy*, 39 F.3d 1011 (9th Cir. 1994) (no endangerment when foundation barrier prevented exposure); *Leister v. Black & Decker (U.S.), Inc.*, No. 96-1751, 1997 WL 378046, at **1-3 (4th Cir. July 8, 1997) (no endangerment when filtration system removed contamination from drinking water, the most direct exposure pathway, though soil had not yet been remediated).

[10] *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193-96 (6th Cir. 1995) (abstention in light of agency oversight)

general narrow-tailoring rule that "federal courts should aim to ensure 'the framing of relief no broader than required by the precise facts'" (*Laidlaw*, 528 U.S. at 193), which is especially important to avoid undertaking unwieldy judicial tasks and short-circuiting state government processes (*e.g.*, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)). And relief must be narrow to comport with the agency-respecting policies of Section 7002 itself and of CERCLA. *See United States v. Fausto*, 484 U.S. 439, 453 (1988) (courts must get laws "to 'make sense' in combination"); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497-98 (2001) (equity must be exercised to respect statutory policy). The Third Circuit's approach to remedy violates these basic commands.

A. The Third Circuit authorized a vast injunction that went far beyond what was "necessary" to abate any imminent and substantial endangerment. The testimony of the key remedial expert on respondents' side and of the NJDEP project manager established that no more was needed than a containment remedy, if maintained. Page 11, *supra*. That should have been the end of the role for RCRA Section 7002(a)(1)(B).

Where lesser measures abate the endangerment, a goal of "permanent" cure exceeds what Section 7002 authorizes. The difference is a matter not just of plain language and logic, but of nationwide practice. Hundreds, or thousands, of waste sites have been "capped" (another term for a "containment" remedy) with responsible agencies determining that the caps – which, of course, need to be maintained – are all that is necessary to contain the hazards. CAJA2595. Indeed, containment is the presumptive EPA-approved remedy for large-volume sites like municipal landfills, and it is also the presumptive remedy for sites (like this one) with metals in soils that cannot practicably be

recovered or treated on site.[11] The need for continuing maintenance cannot make a containment remedy insufficient (so that more is "necessary") unless the regular practice of the EPA and state agencies is now to be rejected and all the sites they have capped are now to be re-opened on the ground that "human nature being what it is" (Pet. App. A93), maintenance cannot be trusted.

B. The Third Circuit endorsed the district court's disparagement of the NJDEP's process of dealing with the Property (among some 200 other chromium sites). That view of NJDEP, even if accepted, still would not make maintenance *under court supervision* insufficient. But, in any event, even aside from ignoring the presumption of state agency regularity, and NJDEP's active and large-scale enforcement program,[12] the lower courts' view of the NJDEP process, and hence the authorized scope of Section 7002 remedial authority, rests on a fundamental disregard of the nature of the process approved by Congress for the handling of sites like this one. That process is laid out in CERCLA, as explained at pages 2-5, *supra*, which was simply ignored by the Third Circuit.

Although the lower courts condemned the NJDEP for its stage-by-stage, study-draft-and-comment process, that is the prescribed procedure, for good reason, under both federal and state law. NJDEP could not and should not have

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[11] *See* 40 C.F.R. § 300.430(a)(1)(iii)(B), (Pet. App. A250); EPA Office of Emergency and Remedial Response *Presumptive Remedy for CERCLA Municipal Landfill Sites* (1993) (CAJA17397) and *Presumptive Remedy for Metals-in-Soil Sites* (1999) (CAJA17341).

[12] NJDEP has considerable resources and a well-known commitment to active remediation. Its budget for 2003-2004 was $206,692,000, with $45,604,000 for the Site Remediation Program. CAJA17653-54. NJDEP is a national leader in Brownfields redevelopment. National Governors Ass'n, *New Report by NGA on Brownfields Highlights Accomplishments in New Jersey*, http://www.nga.org/nga/newsRoom/1,1169,C_PRESS_RELEASE%5ED_322,00. html (CAJA17655).

dispensed with the process and simply ordered excavation years ago. And that process takes time if it is to lead to *sound* remedial decisions. Illustratively: as of late 1999, almost 40% of the 711 sites that were added to the NPL before CERCLA was amended in 1986 were still not "construction complete." EPA, *Pre-SARA Sites: Analysis of Why Construction Is Not Yet Complete at Certain Sites* (Draft June 6, 2003) (CAJA17599). By mid-2003, fully 202 still were undergoing investigation and/or remediation. *Id.*

As long as any problems requiring immediate intervention are taken care of – as they were (respondents and the district court allowed 8 years of pre-trial proceedings, much of it focused on site-owner Grace's commercial interests, without any preliminary relief) – the process that NJDEP was following (and EPA would have followed) cannot be condemned. Permanent remediation is committed to agencies, which properly go about their task in just the way NJDEP did. To condemn that process as making a judicial takeover under RCRA "necessary," as the Third Circuit did, is to put the entire Superfund program at risk (given the low thresholds adopted for standing and for finding an imminent and substantial endangerment).

C. The Third Circuit's view of the scope of Section 7002 remedial authority fundamentally disregarded not just the agency processes but also the substantive criteria for permanent remedies prescribed under CERCLA. Section 105 of CERCLA declares that after the revised NCP was published (in 1982) the "response to … hazardous substance releases shall, to the greatest extent possible, be in accordance with the [NCP]." The Third Circuit ignored the elementary judicial duty to ensure that any "necessary" remedy under RCRA Section 7002 respect the obviously pertinent policies adopted by Congress.

Failure to do so – by allowing broad citizen-suit remedies under RCRA in a case myopically focused on one site – would make a consistent and coherent national

environmental policy all but impossible. RCRA cannot be applied to turn CERCLA policies topsy turvy. If EPA had found that the Property presented a *greater* danger than it in fact found, and had it listed the Property on the NPL, permanent remediation would have been governed by all the requirements of the NCP, including the substantive criteria and the orderly process of decision. The Third Circuit here approved displacement of the NCP, and adoption of a vastly increased remedy (which dwarfs virtually all other cleanup remedies ever adopted), precisely because the site did not present such a great risk and was not listed on the NPL.

The absence of a disciplined NCP analysis was not just a technical failing; it had enormous consequences in this case. As noted regarding EPA's presumptive remedies, the NCP's standards and procedures have led to widespread use of containment remedies in circumstances like these. NJDEP likewise has regularly balanced the relevant factors to adopt engineering and institutional controls, explaining particularly that excavation is not usually appropriate because of the limited capacity of land-disposal facilities. NJDEP, *Guidance Document for the Remediation of Contaminated Soils* 13 (1998) (CAJA17445).

The evidence that containment works (with maintenance), plus the extravagant cost of excavation, would point powerfully toward containment, not excavation, under NCP criteria. More generally, such criteria trigger questions the district court here did not ask. Assuming it would be better for the few people who might one day reside on the Property and for some barnacles and clams in the Hackensack River along the Property's bulkhead, is it worthwhile to move over 1,500,000 tons of fill to upstate New York, Nevada, and/or points in-between (and over 1,500,000 tons of clean fill back onto the Property)?[13] Is it

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[13] Treatment and disposal facilities in Alabama, Idaho, Indiana, Louisiana, Michigan, Nevada, New York, Ohio, Oklahoma, Oregon,

better for other Jersey City residents, for motorists, for the communities where the material will be treated and buried, for companies and government entities who have a need for scarce hazardous waste treatment and landfill capacity? What are the prospects for yet-unknown technological developments that might eventually allow treatment on site?

These questions are serious ones for the Property. If excavation takes four years (375,000 tons per year), this site alone will contribute over seven times New Jersey's entire annual 48,000 tons of hazardous waste from environmental remediation. EPA, *The National Biennial RCRA Hazardous Waste Report Based on 2001 Data* (*State Detail Analysis*) 258 (2003) (CAJA17591). The total of 1,500,000 tons is more than the entire hazardous waste deposited in offsite landfills *in the country* in 2001. *Id.* (*National Analysis* ex. 2.9) (CAJA17582). This site alone, though less threatening than 1,500 sites on the NPL, will thus consume a substantial portion of national landfill capacity for several years. And the excavation process itself inevitably risks injury and fatality from physical hazards, both on-site and during the massive transportation process required. For a large site, the risk to remediation workers and off-site motorists can easily exceed the health risk from leaving the soil in place and capping it.[14]

The established standard of cost-effectiveness, even viewed just in dollar terms, also presents a serious issue for

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Pennsylvania, Texas, and Utah, and one in Canada, are under consideration. There ~~are~~ no suitable landfills in New Jersey.

[14] In a recent quantitative risk comparison regarding a former chemical manufacturing facility in New Jersey, the total risk from (1) excavation, transportation, and off-site incineration dwarfed the risk from (2) on-site containment and capping. Scott, Pittignano, and Finley, *Evaluation of the Physical Hazards Associated with Two Remedial Alternatives at a Superfund Site*, 21 *Risk Analysis* 53 (2001) (CAJA17755). *See also* Gerrard, *Safety Hazards in Hazardous Waste Remediation*, N.Y.L.J. p.3 (July 26, 2002) (CAJA17751).

this site. The injunction here is one of the most expensive environmental cleanups in history. The average remedial cost at a non-federal-facility NPL site is $21.8 million, with remedies at 69% of such sites costing less than $10 million. Congressional Research Service, *Superfund Fact Book* 19 (1999) (CAJA17682). These are all sites that EPA has judged to be more dangerous than the Property. Although "Honeywell is a large international corporation with revenues in the billions of dollars" (Pet. App. A173), the fact is that the remedy compels a $400+ million expenditure of society's resources that could be used for other purposes. *See* Stephen Breyer, *Breaking the Vicious Circle* 11-19 (1993) (CAJA17714-22). NCP criteria require such costs to be justified by a sufficient benefit – a standard the district court did not apply, but NJDEP and EPA would have.

In the end, the agency criteria, like the agency processes, are essential to a coherent approach to site remediation. A myopic focus on one site unduly invites the conclusion that it is preferable to excavate all historical waste material and put it somewhere else. EPA and NJDEP have the capacity to take a broader view, and make the necessary policy judgments. The district court's injunction improperly displaces the agencies' processes and criteria.

D. By overextending RCRA authority, the Third Circuit approved a remedy that invites the very implementation difficulties that other courts have recognized to be ones federal courts should try to avoid. *See Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 277 (7th Cir. 1992); *NRDC v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992). As the Seventh Circuit ruled in *Cookie*, "[c]ourts should be, and generally are, reluctant to issue 'regulatory' injunctions that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties." 970 F.2d at 277 (collecting cases). *See NRDC*, 966 F.2d at 1300 ("Injunctive relief may be inappropriate where it

requires constant supervision .... While recognizing the importance of the interests involved, we nevertheless decline to engage in the active management of such a remedy.").

The injunction here breaches that principle. The district court had to create its own administrative agency for implementation, which is requiring resolution of numerous scientific, technical, legal, and policy issues concerning, *e.g.*, excavation, transportation, treatment, and disposal of over 1,500,000 tons of soil; deep-groundwater remediation; and sediment remediation. Senator Torricelli and his staff have to develop technical expertise already present at NJDEP. RCRA's standard for relief – what is "necessary" – cannot properly be stretched to authorize such a departure from the proper role of the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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